UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---x
CECIL LEWIS, as Administrator of the Estate of STEPHANIE LEWIS
Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.
---x

MEMORANDUM AND ORDER

04-cv-2331 (SLT) (MDG)

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ JUN 24 2015 ★
BROOKLYN OFFICE

TOWNES, United States District Judge,

Substitute plaintiff Cecil Lewis brings this action as administrator of the estate of his deceased wife and former-plaintiff, Stephanie Lewis, ("Lewis"), alleging that the New York City Transit Authority ("the Transit Authority") discriminated against Lewis on account of her religion. After this Court denied the Transit Authority's motion for summary judgment, the parties entered Court-annexed mediation. At the conclusion the mediation, the parties agreed to settle the matter and signed a document, entitled "Confidential Settlement Communication," which purports to set out the general terms of a settlement and contemplates a further memorialization of terms in a final settlement agreement. Approximately two months after signing the Term Sheet, negotiations of the final settlement agreement broke down. The Transit Authority now seeks to enforce the settlement. For the following reasons, the Transit Authority's motion is granted.

BACKGROUND

The Court assumes the parties' familiarity with the underlying facts, which are set forth in detail in this Court's March 31, 2014 order. *See Lewis v. New York City Transit Auth.*, 12 F.Supp.3d 418 (E.D.N.Y. 2014). As relevant here, as directed by Magistrate Judge Go, the parties participated in Court-annexed mediation on June 4, 2014. At the conclusion of the mediation, the mediator reported to Magistrate Judge Go that the parties had reached a settlement. The settlement terms were memorialized in a two page agreement dated June 5, 2014 and signed by counsel for both sides (the "Term Sheet").

As relevant here, the Term Sheet provides: "After engaging in Court-annexed mediation before Ruth D. Raisfeld, Esq., on June 4, 2014, the parties agreed to settle the above-captioned case pursuant to the following terms." (Term Sheet cl. 1.) The Term Sheet then sets out the sum that the Transit Authority will pay to the plaintiff's estate and breaks down the amounts to be allocated for compensatory damages, costs, expenses and expert fees, and back pay. (Term Sheet ¶ 1.) The Term Sheet provides that "The parties will memorialize the settlement terms in a written settlement agreement, executed by both parties and their attorneys." (Term Sheet ¶ 2.) It further provides that the parties will execute a stipulation of dismissal and that plaintiff's attorney will secure necessary approvals from the Surrogate's Court. Finally, it provides:

> With regard to attorney's fees, the parties have agreed as follows:
>
> a. Plaintiff's attorneys will serve upon defendants' counsel a demand for attorneys' fees with supporting documentation, within 30 days of the execution of the settlement agreement referenced above.
>
> b. Defendants' attorneys will serve upon plaintiff's attorneys a response to the demand for attorneys' fees, within 30 days of their receipt of the demand.
>
> c. Thereafter, the parties will engage in negotiations to resolve any disputes relating to the demand for attorneys' fees.
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> d. Should the parties be unable to resolve such disputes, they will engage in mediation. If mediation fails to resolve the dispute, plaintiff's counsel will make a fee application with the Court.

(Term Sheet ¶ 5.) Counsel for both sides signed the Term Sheet on June 5, 2014, after emailing drafts of the Term Sheet back and forth several times to correct various non-substantive and typographical errors.

On June 30, 2014, counsel for the Transit Authority emailed plaintiff's counsel drafts of the stipulation of dismissal and settlement agreement, as contemplated in the Term Sheet. (Lewis Ex. 1; Bhatt Decl. ¶ 18.) In response, on August 12, 2014, plaintiff's counsel emailed a revised draft settlement agreement to the Transit Authority's counsel, which included, *inter alia*, the two additional provisions that are at the heart of the dispute in the instant motion. (Lewis Ex. 2.) First, plaintiff's counsel added a provision providing that neither party would appeal the District Court's determination of attorney's fees to the Second Circuit Court of Appeals. Second, plaintiff's counsel added language declaring plaintiff the prevailing party for the purposes of attorney's fees and limiting the Transit Authority to opposing the amount of attorney's fees but not plaintiff's counsel's entitlement to such fees. (Mohammadi Decl. ¶ 26.) Plaintiff's counsel maintained that these two provisions were agreed upon at the start of the mediation as "preconditions" to settlement but omitted from the Term Sheet. (Lewis Ex. 6; Schwartz Decl. ¶ 2; Mohammedi Decl. ¶¶ 9-14.) Counsel for the Transit Authority rejected these two proposed additions to the draft settlement agreement. The Transit Authority's counsel acknowledged that a limitation on appeals was initially discussed, but explained that it was ultimately "expressly withdrawn at the Mediator's urging." (Lewis Ex. 5; Bhatt Decl. ¶ 19.) Further, the Transit Authority's counsel rejected the proposed language that plaintiff's counsel be "entitled" to fees, but was willing to incorporate the following language:

> Plaintiff will be treated as "prevailing party" solely for the purpose of an award of reasonable attorneys' fees payable by NYCTA. Designation of Plaintiff as "prevailing party" does not constitute an admission by NYCTA, adjudication against NYCTA or finding on the merits against NYCTA, or an agreement by NYCTA as to the particular amount of any proposed reasonable attorneys' fees that the court should award.

(Lewis Ex. 5.) At this point, the parties' negotiations of the proposed settlement agreement broke down.

The Transit Authority now seeks to enforce the Term Sheet pursuant to Local Rule 83.8(b)(6). Plaintiff's counsel opposes, contending that the Term Sheet is merely a preliminary agreement, which (1) the parties never intended to be binding as evinced by the language of the Term Sheet and the parties' subsequent negotiations, and (2) even if the parties did intend it to be binding, is unenforceable because there was no meeting of the minds as to all material terms, *i.e.*, attorney's fees.

DISCUSSION

"A settlement agreement is a contract that is interpreted according to general principles of contract law." *Powell v. Omnicom*, 497 F.3d 124, 128 (2d Cir. 2007). "A trial court has inherent power to enforce summarily a settlement agreement when the terms of the agreement are clear and unambiguous." *Omega Engineering, Inc. v. Omega, S.A.,* 432 F.3d 437, 444 (2d Cir. 2005). A settlement agreement is enforceable if there is "an offer, acceptance, consideration, mutual assent and intent to be bound." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir. 2004). For a contract to be enforceable, there must be mutual assent "on all essential terms," often referred to as a "meeting of the minds." *Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 372 (2d Cir. 2003) (quoting *Schurr v. Austin Galleries of Illinois, Inc.*, 719 F.2d 571, 576 (2d Cir. 1983)). Essential terms are "all the issues perceived to require negotiation." *Brown v. Cara*, 420 F.3d 148, 153 (2d Cir. 2005) (quoting *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 548 (2d Cir. 1998)). Where, as here, "a contract is unambiguous, the instrument alone is taken to express the intent of the parties." *Klos v. Lotnicze*, 133 F.3d 164, 168 (2d Cir. 1997).

In *Raghavendra v. Trustees of Columbia Univ.*, the district court considered whether a term sheet signed after a mediation session constituted a valid and binding agreement to settle.

686 F. Supp. 2d 332, 341 (S.D.N.Y. 2010), *adopting R&R, aff'd in relevant part, remanded on other grounds*, 434 F. App'x 31 (2d Cir. 2011). The court noted that "[a]lough the Term Sheet expressly provides that it was not meant to be the final expression of the settlement agreement, the Second Circuit has recognized that a preliminary agreement is binding 'when the parties agree on all the points that require negotiation (including whether to be bound) but agree to memorialize their agreement in a more formal document. Such an agreement is ... preliminary only in form.'" *Id.* (quoting *Adjustritel,* 145 F.3d at 548; *see also Brown*, 420 F.3d at 154 (explaining that a binding preliminary agreement is created when "the parties have agreed to all necessary elements of the contract and are, therefore, bound to the ultimate objective despite the fact that a more formal or elaborate writing has yet to be produced."); *Delyanis v. Dyna-Empire, Inc.*, 465 F. Supp. 2d 170, 176 (E.D.N.Y. 2006) (finding informal emails after mediation created binding settlement agreement, where the writings demonstrated an intent to be bound and settle the case); *McNamara v. Tourneau, Inc.*, 464 F. Supp. 2d 232, 239 (S.D.N.Y. 2006) (finding stipulation of settlement following Court-annexed mediation is a binding contract because it "clearly states that the parties reached an agreement to settle the case on six principal terms," and "the context of the settlement discussions demonstrates that this was not a mere agreement to continue negotiations in good faith[,] ... even though the parties never executed a formal contract."). The *Raghavendra* court found that the Term Sheet was binding because it "evidence[d] a meeting of the minds on all material terms," *i.e.*, "withdrawal of plaintiff's claims against all defendants and the exchange of monetary and non-monetary consideration," and included language "establishing a mutual intent to be bound." 686 F. Supp. 2d at 340.

Here, as in *Raghavendra*, under the putative agreement outlined in the Term Sheet, the parties agreed, *inter alia,* that plaintiff would dismiss, with prejudice, all claims against the

Transit Authority in exchange for monetary consideration, which constitutes "consideration on both sides of the agreement." *Id.* Furthermore, the agreement was signed by both parties and states that "the parties agreed to settle the above-captioned case pursuant to the following terms," which evinces mutual assent and an intent to be bound on both sides. (Term Sheet cl. 1.) *See* 686 F. Supp. 2d at 340 (finding settlement agreement signed by all parties which stated that it was "final and binding upon the parties" evinced mutual assent and an intent to be bound on both sides.) Thus, as in *Raghavendra*, the Term Sheet constituted a binding and enforceable settlement agreement even though it contemplated a further and more formal memorialization of the terms.

Plaintiff's counsel maintains that the parties never intended the Term Sheet to be binding, pointing to language in the Term Sheet that contemplates further approval by the Surrogate's Court and subsequent discussions that the parties had about the settlement agreement. Neither of these arguments is availing.

The Term Sheet provides that: "Plaintiff's attorney will arrange to obtain all necessary approvals for the settlement of this matter with the Surrogate's Court, including satisfying any outstanding liens or other debts owed." (Term Sheet ¶ 4.) Plaintiff's counsel argues that the fact that the parties contemplated subsequent Surrogate's Court approval in the Term Sheet demonstrates that they did not intend for the Term Sheet to be binding. While there is a "strong presumption" against finding a binding preliminary contract where the agreement includes "open terms, call[s] for future approvals and expressly anticipate[s] future preparation and execution of contract documents," that presumption has no application here. *Brown*, 420 F.3d at 154 (internal citations and quotation marks omitted). Under the plain language of the Term Sheet, obtaining Surrogate's Court approval is a matter impacting "performance of the settlement rather than assent to its terms." *Powell*, 497 F.3d at 130 (rejecting argument that "because the parties were unable to agree on a mutually satisfactory reference letter and because Omnicom has not removed the negative review from [plainitff's] personnel file [as called for in the settlement agreement], the parties did not agree to all the terms of the settlement" because these are matters of performance, not assent.); *Vacco v. Harrah's Operating Co.*, 661 F. Supp. 2d 186, 202 (N.D.N.Y. 2009) (finding "no merit to Plaintiffs' argument that all material terms of the settlement had not been resolved … because the Tribal Court's rules for settling class action had not been complied with … [because] the extent to which certain Tribal Court rules needed to be complied with to effectuate the terms of the settlement is a matter impacting 'performance of the settlement rather than assent to its terms.'") (quoting *Powell*, 497 F.3d at 130). In other words, under the express language of the binding settlement agreement, as part of the terms of the settlement, plaintiff's counsel must secure necessary approvals and satisfy outstanding liens and debts. This is a matter of performance having no bearing on the parties' intent to be bound.

Plaintiff's counsel also points to post-settlement discussions to argue that the Term Sheet was not intended to be final and binding. Because this Court finds that the Term Sheet unambiguously sets out the parties' intent to be bound by its terms, the Court does not consider parol evidence of the parties' intent. *Klos v. Lotnicze*, 133 F.3d 164, 168 (2d Cir.1997) (A contract "is unambiguous when it has a definite and precise meaning and where there is no reasonable basis for a difference of opinion."). However, even if there were an ambiguity, "[t]he post-Agreement discussions … merely indicate that [plaintiff's counsel] experienced a change of heart with respect to the settlement terms, but do not address the issue of whether a contract was formed." *Spanierman Gallery v. Merritt*, No. 00 CIV. 5712 (THK), 2004 WL 1781006, at *11 (S.D.N.Y. Aug. 10, 2004).

Additionally, Plaintiff's counsel asserts that there was no meeting of the minds as to an essential term, namely attorney's fees. However, that assertion is belied by the plain language of the Term Sheet. The "inquiry [into whether there was a meeting of the minds] is an objective one," and "the subjective intent of the parties is irrelevant, if the contract is unambiguous." *Summit Health, Inc. v. APS Healthcare Bethesda, Inc.*, 993 F. Supp. 2d 379, 397 (S.D.N.Y. 2014) (rejecting argument that there was no meeting of the minds because the contract was unambiguous); *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1278 (2d Cir. 1989) (rejecting argument that there was no meeting of the minds "[s]ince the contested term was unambiguous, a contract was formed, whatever unexpressed intention [one of the parties] may have had."); *Commins v. Couture*, 12 A.D.3d 999, 1002 (N.Y. App. Div. 3d Dep't 2004) (where a party's "stated beliefs and desires … are not contained within the four corners of the [contract], [the party] cannot resort to parol evidence to create an ambiguity where one does not otherwise exist."). This is not a case in which an essential term, such as price, is missing from an agreement thereby creating ambiguity. *See, e.g.*, *Express Indus. & Terminal Corp. v. New York State Dep't of Transp.*, 93 N.Y.2d 584, 589 (1999) (expiration date of option and amount price reduction were omitted *material* terms). Rather, the Term Sheet plainly sets out all of the material terms of settlement, *i.e*, the claims to be dismissed and the settlement amount. S*ee Adalian v. Stuyvesant Plaza Inc.*, 288 A.D.2d 789, 791 (N.Y. App. Div. 3d Dep't 2001) (finding "meeting of the minds as to the essential terms of the settlement," where parties agreed on "the injuries covered by the release [and] the amount to be paid in settling their claims"). Moreover, a full page of the two-page Term Sheet is dedicated to outlining the procedure which will govern any dispute over attorney's fees. Given that the provisions governing attorney's fees are not ambiguous, this Court will not resort to parol evidence to create an ambiguity. There is no reasonable reading of the language which would support Plaintiff's counsel's preferred version of the attorney's fees portion of the Term Sheet. Thus, plaintiff's counsel's suggestion that there was no "meeting of the minds" on the attorney's fees procedures is without merit.

To the extent plaintiff's counsel suggests that the omission of the attorney's fees appellate waiver and prevailing party provision are mere scrivener's errors, upon review of counsel's conduct, this Court finds that this suggestion is not credible. "It is 'basic contract law' that one cannot nullify a contract 'based on one's own failure to read it.'" *Jian Wang v. Int'l Bus. Machines Corp.*, No. 11 CV 2992 VB, 2014 WL 6645251, at *4 (S.D.N.Y. Oct. 7, 2014) (citation omitted). The Term Sheet was not signed in haste. Plaintiff's counsel reviewed the draft repeatedly, and sent multiple revisions by email before singing the document. Plaintiff's lead counsel received a copy of the signed Term Sheet and took no prompt action to correct or amend it. Rather, Plaintiff's counsel raised the purportedly missing provisions for the first time over two months later, when the parties were working out the details of the more robust written settlement agreement. This conduct suggests that plaintiff's counsel experienced a change of heart after securing a favorable settlement for his client. If a waiver of the parties' right to appeal the district court's fees determination were an accidentally omitted, but essential and bargained-for term, the Court would expect plaintiff's counsel to have acted more hastily to correct the omission.

"When a party makes a deliberate, strategic choice to settle, a court cannot relieve him of that a [*sic*] choice simply because his assessment of the consequences was incorrect." *Powell*, 497 F.3d at 128 (citations omitted). The Term Sheet constitutes an enforceable settlement agreement and the Court will not relieve plaintiff's counsel because he wishes a more favorable arrangement for attorney's fees had been struck.

CONCLUSION

This Court has reviewed the terms of the settlement agreement as found in the Term Sheet and concludes that a valid and binding contract exists between the parties. Accordingly, the Transit Authority's motion to enforce the settlement agreement is granted. Plaintiff's counsel is directed to submit a status report advising the Court about the status of the required Surrogate's Court approval within 14 days of the date of this order. Upon receipt of the required approvals, the parties are directed to promptly file a stipulation of dismissal with prejudice and the Transit Authority is directed to promptly remit payment to plaintiff. Any demand for attorney's fees must by served on the Transit Authority within 30 days of the filing of the stipulation of dismissal.

SO ORDERED.

/s/ Sandra L. Townes
SANDRA L. TOWNES
United States District Judge

Brooklyn, New York
Dated: June 22, 2015